Supreme Court, U.S.
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No. 92-1110

In The

# Supreme Court of the United States

Ocober Term, 1992

DENNIS WELLIVER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## REPLY BRIEF TO THE BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Is a sole proprietor's Fourth Amendment right against a warrantless seizure of his property destroyed because a government agency has a contractual right of access to the business records?

2. Whether oral juror questions to witnesses during a criminal trial are inherently prejudicial to the defendant's Fifth Amendment right to due process and Sixth Amendment right to a fair and impartial jury?

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## OPINION BELOW

The opinion of the Court of Appeals, Pet. App. A-1-A-16, is reported at 976 F.2d 1148.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1992. The Petition for a Writ of Certiorari

was filed on December 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## REPLY TO ARGUMENT

This Reply Brief is addressed to an argument first raised in the Brief in Opposition filed by the United States. The United States opposes the Petition for Certiorari as it pertains to the Fourth Amendment issue on a ground not decided by the Court of Appeals. The Court of Appeals held that the determinative issue was whether Petitioner's subjective expectation of privacy was reasonable and applied a test enunciated in *Katz v. United States*, 389 U.S. 347, 351 (1967). In its Brief in Opposition, the government does not discuss *Katz*, and devotes only one paragraph of its argument to the Court of Appeals' analysis. Gov't. Br. 7-8.

Rather than substantively respond to the Fourth Amendment argument asserted by the Petitioner, which was based upon the holding of the Court of Appeals, the government fabricates a new issue that mischaracterizes the evidence and was not ruled upon by the Court of Appeals. In an attempt to focus the Court's attention away from the real issue decided by the Court of Appeals, the government argues that there was no Fourth Amendment violation because Tuma, an employee of Petitioner could and allegedly did, voluntarily disclose Petitioner's business records to the government agent. Gov't. Br. 5. This argument is not based on the facts of this case or the Court of Appeals' holding.

Further, the government's reliance on *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978); *United States v. Miller*, 425 U.S. 435, 442 (1976); *United States v. Miller*, 800 F.2d 129, 134 (7th Cir. 1986); and *United States v. Ziperstein*, 601 F.2d 281, 289 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), Gov't. Br. 5, is misplaced. This is not a case where an employee voluntarily reported a violation to the government. *See Marshall v. Barlow's, Inc.*, 436 U.S. at 315. This is not a case where an employee freely and without government involvement voluntarily came forward. *See United States v. Ziperstein*, 601 F.2d at 290. This is not a case where the government had a subpoena and served it upon the custodian of the company's records. *See United States v. Miller*, 800 F.2d at 135. Further, this is not a case where the government obtained the evidence from a third party, such as the bank in *United States v. Miller*, 425 U.S. 435 (1976). This is a case where it is undisputed that the employee seized Petitioner's property at the instigation and direction of government Agent Diers, and the encouragement of a state deputy sheriff.

It is undisputed that Agent Diers contacted Tuma who was only 20 years old at the time, and showed her a piece of paper containing the penalties for aiding and abetting, *i.e.* five to fifteen years. Pet. App. A-4. It is undisputed that Agent Diers asked her to go to Petitioner's office at night and retrieve certain business records. *Id.* It is also undisputed that Agent Diers waited outside Petitioner's office in a car while Tuma went inside and took the business records from her boss' (Anderson's) desk. It is also undisputed that Agent Diers asked Tuma, a second time to retrieve another document that did not even exist in hard copy, and that Tuma

returned to the office on a day that she wasn't working and printed out a computer program from Petitioner's computer and gave it to Agent Diers. *See id.*

Under these circumstances, the government's involvement in, knowledge of, and participation in the searches and seizures of Petitioner's property was sufficient to make Tuma an agent of the government for purposes of the Fourth Amendment.

Although the Fourth Amendment's protections against unreasonable searches and seizures do not extend to a search or seizure made by a private individual, *Burdeau v. McDowell*, 256 U.S. 465 (1921), this Court has recognized an exception to this general rule. It has been held that a search or seizure occurs within the meaning of the Fourth Amendment and that the constitutional protections are fully applicable in the case of a search by a private individual who becomes the agent of the police by virtue of their suggestion, order, request, or participation for purposes of a criminal investigation. *See, e.g., Lustig v. United States*, 338 U.S. 74 (1949); *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981); *United States v. Newton*, 510 F.2d 1149 (7th Cir. 1975); *Knoll Associates, Inc. v. FTC*, 397 F.2d 530 (7th Cir. 1968); *see also, Gundlach v. Janing*, 401 F. Supp. 1089 (D. Neb. 1975), *aff'd*, 536 F.2d 754, 755 (8th Cir. 1976) (*per curiam*).

The government may not do through a private individual, that which it is otherwise forbidden to do. If, in light of all the circumstances, a private party conducting a search must be regarded as an instrument or agent of the government, the Fourth Amendment applies to that

party's actions. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

The above analysis and line of cases applies in this case. The test for determining whether Tuma became an agent of the government does not change just because she happened to be an employee of the Petitioner. Otherwise, the government could avoid the reach of the Fourth Amendment simply by making an employee its agent for purposes of conducting searches and seizures. In this case, there can be no doubt that the government requested the searches and seizures, encouraged the searches and seizures, knew of the searches and seizures, and accepted the fruits of the searches and seizures. There was prior knowledge, instigation, and direction. This conduct constitutes involvement by the government in the searches and seizures sufficient to make Tuma an agent of the government for purposes of the Fourth Amendment.

The government's Brief in Opposition to the Petition for Certiorari fails in any way to address the issue of Tuma's status as an agent of the government. The government's brief totally ignores the circumstances of Tuma's searches and seizures of these records and would have this Court believe that this case simply involved an employee who voluntarily came forward and turned over her employer's business records without any instigation, or participation by the government. The informant cases cited by the government at page 6 are simply not applicable in this case. Accordingly, the government's primary argument pertaining to the Fourth Amendment issue should be rejected because it is not supported by the record in this case, nor is it based upon a ruling of the

Court of Appeals. The Court of Appeals expressly stated that it was not necessary to determine whether Tuma was an agent of the government. Pet. App. A-7, n.3, A-11.

The government's argument incorrectly assumes that Tuma was not an agent of the government when she seized Petitioner's records for Agent Diers. This was not the holding of the Court of Appeals. Thus, the whole premise of the government's primary argument in opposition to the Petition for Certiorari on the Fourth Amendment issue is faulty and its conclusion is fatally flawed. The government should not be allowed to conveniently ignore the holding of the Court of Appeals in this case for purposes of this Court's consideration of the Petition. If this Petition for Certiorari is not granted on the Fourth Amendment issue, the law of this case and in the Eighth Circuit will be that a sole proprietor does not have a reasonable expectation of privacy in his business records if a government agency has a contractual right of access to those records.

The Petition for Certiorari should be granted for the reasons articulated in the Petition. Regarding the Fourth Amendment issue, the Court of Appeals held that under *Katz*, the Petitioner did not have a reasonable expectation of privacy in his business records because of the agency's contractual right of access. This decision creates a new exception to the Fourth Amendment protection from warrantless searches and seizures and conflicts with the decisions of this Court. If left to stand, the holding in this case will authorize any federal agent to seize private business records without a warrant merely if the federal agency has the contractual right to ask to see the records.

Lastly, notwithstanding the government's conclusory two paragraph argument regarding the juror questioning issue, Gov't. Br. 8-9, the practice of permitting jurors to question witnesses during a criminal case is inherently prejudicial to a defendant's Fifth Amendment right to due process and Sixth Amendment right to a fair and impartial jury. In addition, Petitioner was prejudiced by the jury interrogation process in this case which constituted plain error. One juror asked a question out loud in open court that would have been grounds for a mistrial, if it had been asked by the prosecutor. Allowing the juror to ask the question in open court constituted prejudice to the Petitioner, and was not cured by the fact that the judge refused to allow the witness to answer. Pet. App. A-14.

## CONCLUSION

Petitioner respectfully requests this Court to grant certiorari to address the important Fourth Amendment issue raised in this Petition. The decision of the Court of Appeals creates a new exception to the requirement of a warrant for government seizures in the commercial setting that is in conflict with this Court's prior holdings and will continue to cause confusion in the circuits. The government's Brief in Opposition does not adequately respond to this issue.

The Petition for Certiorari should be granted on the issue of juror questioning because numerous courts, both

federal and state, have considered the question with conflicting results. In a criminal case, this takes on constitutional dimensions and is inherently prejudicial. The lower courts need guidance on this important question and Petitioner respectfully urges the Court to grant his Petition.

Dated March 18, 1993.

Respectfully submitted,

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